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Response: Worthier for Whom?

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WORTHIER FOR WHOM?

KATHELEEN GUZMAN*

*It is said, in the old books, that “a devise to the heir is void.”*¹

I. Introduction

The law of future interests is often indicted for its relative antiquation. The critique is understandable. Medieval England was wracked with disease, battle, conquest, hardscrabble living conditions; an agricultural economy with a limited land supply and vertical ownership structure; an abiding fear of attack from without or insurrection from within; the need for the creation of a loyal defense or a stout tax collection practice to buy one; and a religious perspective faithful to the unassailable, God-given rights of those with more money, more power, or (and generally also owing to) a more fortuitous circumstance of birth.² Both by instigation and in non-linear response came a complicated set of rules about land, which when viewed from a current perspective seem puzzling if not perverse. Some, like the Rule Against Perpetuities or the Statute of Uses, at least present as old (if not necessarily familiar) acquaintances. More esoteric curiosities—the Rule in *Clobberie’s Case*,³ or the consequences of *Purefoy v. Rogers*⁴ on *Pells v. Brown*⁵—less so. And the extent to which such rules still exist, while absorbing to the few who find a certain elegance therein, is probably rarely answered much less asked.

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1. Fowler Vincent Harper & Frederick E. Heckel, *The Doctrine of Worthier Title*, 24 ILL. L. REV. 627, 627 (1930) (quoting 1 ROLLE’S ABRIDGEMENT 626).

2. See generally SUSAN REYNOLDS, FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED 1-74, 323-86 (1994). Admittedly, Dr. Reynolds’s scholarship itself might find fault with such sweeping pronouncements, as she explicitly admonishes that “[w]e cannot understand medieval society and its property relations if we see it through seventeenth- or eighteenth-century spectacles.” *Id.* at 3. Nevertheless, that seems to be exactly what we try to do, and with increasingly modern glasses.

3. (1677) 86 Eng. Rep. 476; 2 Vent. 342 (essentially favoring vested over non-vested interests).

4. (1670) 85 Eng. Rep. 1181; 2 Wm. Saund. 380 (an interest capable of being construed as a remainder will be construed as a remainder).

5. (1620) 79 Eng. Rep. 504; Cro. Jac. 590 (applying the Doctrine of Destructibility to contingent remainders, not to executory interests).

Judge Morris asks. His exacting essay continues a distinguished treatment of the particular property rule known as the Doctrine of Worthier Title,⁶ which prohibits a grantor's conveyance to the grantor's own heirs. Although "generally accepted as part of the American common law in the nineteenth century"⁷ and continuing to "play[] a vigorous and important role in modern law"⁸ into the twentieth, the Doctrine has recently been dismissed as "not recognized as part of American law"⁹ in the twenty-first century—or so the Restatement (Third) of Property proclaims. This, to Judge Morris, should trouble anyone with a keen interest in future interest rules.¹⁰ Further intimating his belief in the Doctrine's ongoing merit, he asserts that the Restatement's averral should not be uncritically received, and instead should prompt each jurisdiction having not yet answered the question determinatively to make that assessment for itself.¹¹

The Doctrine of Worthier Title splits into two applications: a testamentary one applying to the construction of wills, and an inter vivos

6. Judge Morris has carefully and thoughtfully deconstructed the Doctrine of Worthier Title for over sixty years. See Joseph W. Morris, *The Worthier Title Doctrine: Does Draft Restatement III of Property Write a Premature Obituary?*, 45 WASHBURN L.J. 387 (2006) [hereinafter Morris, *Worthier Title Doctrine*]; Joseph W. Morris, *The Wills Branch of the Worthier Title Doctrine*, 54 MICH. L. REV. 451 (1956) [hereinafter Morris, *Will's Branch*]; Joseph W. Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949) [hereinafter Morris, *Inter Vivos Branch*]. His scholarship can be found in leading property treatises, and his humble reference only to others as "giants" in the field well applies to himself. See, e.g., 3 JOHN A. BORRON, JR., SIMES AND SMITH: THE LAW OF FUTURE INTERESTS § 1601 n.2 (3d ed. 2002) (specifically noting that "[a]n excellent discussion of the modern law on the rule as to wills is found in [Judge Morris's *Will's Branch* article]"); SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 213 n.160 (6th ed. 2015); HELENE S. SHAPO ET AL., THE LAW OF TRUSTS AND TRUSTEES § 182, at 365 n.75 (3d ed. 2012); LEWIS M. SIMES, LAW OF FUTURE INTERESTS 56 n.1, 57 n.6 (2d ed. 1966); Boris I. Bittker, *Church and Spiegel: The Legislative Sequel*, 59 YALE L.J. 395, 399 n.24 (1950); Stanley M. Johanson, *Reversions, Remainders, and the Doctrine of Worthier Title*, 45 TEX. L. REV. 1, 3 n.10 (1966).

7. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 3.15 (3d ed. 2000).

8. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 154-55 (1st ed. 1962).

9. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 cmt. b (AM. LAW INST. 2011).

10. Although hope springs eternal, I fear that with that limitation, Judge Morris and I might be the only two people who will ever read this essay.

11. Joseph W. Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 68 OKLA. L. REV. 771, 775 (2016) [hereinafter Morris, *2016 Inter Vivos Branch Essay*]; see also Morris, *Worthier Title Doctrine*, *supra* note 6, at 392-93.

one applying to the construction of deeds.¹² Clipped from its sibling, the inter vivos branch is neither friend nor absolute stranger. It survived the crossing of the Atlantic to take root on colonial soil, propagating a sturdy amount of litigation and scholarly discussion, and was, at least as late as 1988 given its reception in the First and Second Restatements of Property,¹³ viewed a justifiable component of American property law.¹⁴ Whatever one thinks of its merits or demerits, that the shift to the Doctrine's alleged obsolescence seems so terse signals that it might deserve a more considered requiem (if any) than the oblivion to which it has been abruptly consigned.

12. See, e.g., KURTZ, *supra* note 6, at 211.

13. See RESTATEMENT OF PROP. § 314 (AM. LAW INST. 1940) (asserting that the continuation of the Doctrine remained justified and noting that as of January 1, 1940, there were no state statutes expressly abolishing it); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2 (AM. LAW INST. 1988) (again asserting that the continuation of the Doctrine remained justified, although recognizing its weakening or death in a number of jurisdictions, either directly or indirectly through both statute and case).

14. The Doctrine's inter vivos branch has fared far better than its testamentary one, the latter "a moribund rule (with the Restatement [(First) of Property] administering the *coup de grace*." KURTZ, *supra* note 6, at 214. Note Professor Moynihan's earlier perspective on the First Restatement:

[It] takes the advanced position that the wills branch of the doctrine is no longer a part of American law. Whether this is an accurate statement of existing law or only "a consummation devoutly to be wished" is open to some question. The doctrine would seem to have a slumbering or potential existence in many jurisdictions.

MOYNIHAN, *supra* note 8, at 154 (footnotes omitted) (citing Morris, *Will's Branch*, *supra* note 6).

Indeed, perhaps because of its recasting as a rule of construction rather than of law, it has also proven a hardier soul than its close cousin, the eponymous Rule in Shelley's Case. See KURTZ, *supra* note 6, at 214-15. The Rule in Shelley's Case essentially prohibits a conveyance to a grantee's heirs, treating the contingent remainder in those heirs as a vested remainder in the named grantee. See MOYNIHAN, *supra* note 8, at 138-49. It appears that the Rule continues to exist, if at all, in but a handful of jurisdictions, 3 BORRON, *supra* note 6, § 1563, with its most recent abolition occurring in Arkansas a little over a decade ago. ARK. CODE ANN. § 18-12-303 (2003) ("When any instrument prepared or executed after July 16, 2003, conveys an interest in any real property to be given to the heirs or issue of any person in words which, under the rule of construction known as the 'Rule in Shelley's Case' would have operated to give to that person an interest in fee simple, those words shall operate as words of purchase and not of limitation.").

Those who have continued to read this far (and into the footnotes, no less!), are presumably interested enough to want to better understand the Rule, including whether its name actually derives from the leading case with which it is commonly associated. See generally John V. Orth, *The Mystery of the Rule in Shelley's Case*, 7 GREEN BAG 2D 45 (2003).

So what to make of a doctrine that by most accounts, arose in reaction to conditions that no longer obtain or to explain a purported mindset that either no longer matters or worse, makes no sense? The obvious answer would be to bless its past usefulness then move beyond it, which is the approach taken with rhetorical economy by the Restatement (Third) of Property.¹⁵ Of course, that answer is only obvious if the question's premises hold true. Moreover, property law in all of its anachronistic convolution is often praised less for logic than predictability—ironically, even of its more innately esoteric (and thus unlikely-to-have-been-relied-upon) aspects: “It is almost as important that property law be predictable as that it be right.”¹⁶

15. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 (AM. LAW INST. 2011). In acknowledging the continued relevance of the Doctrine of Worthier Title, Restatements I and II spent approximately thirty pages in explication and analysis. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2 (AM. LAW INST. 1987); RESTATEMENT OF PROP. § 314 (AM. LAW INST. 1940). Restatement III dispatches matters in about six, with the following pithy critique the most key:

[T]he doctrine of worthier title is not recognized as part of American law, neither as a rule of law nor as a rule of construction. The original rationale for the worthier-title doctrine has long since disappeared, the doctrine is intent-defeating, can produce unexpected adverse tax consequences, and has no justification in public policy. A transferor who actually wants to retain a reversionary interest can . . .

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 cmt. b (AM. LAW INST. 2011).

16. *Propst v. Stillman* (Estate of Propst), 788 P.2d 628, 639 (Cal. 1990) (Broussard, J., concurring and dissenting). Although Justice Broussard was speaking of the retroactive application of a precedent-reversing ruling reflecting an element of justifiable reliance not present here, his full observation nevertheless instructs:

When, as here, we reject a well-established rule that lacked a sound theoretical basis but caused little confusion or dispute, we should make every effort not to make the cure worse than the disease. It is almost as important that property law be predictable as that it be right. When we break with the past in a retroactive opinion, but make substantial reliance on the old rule an affirmative defense, we inevitably engender a far larger volume of litigation than the old rule created. I would prefer to make our opinion take effect prospectively, since I believe this is the only way to cause less disruption and litigation than was caused by the rule we now reject.

Id. at 639-40.

A more contextually targeted sentiment is expressed by Justice George Rose Smith, defending the retention of the Rule in Shelley's Case in Arkansas:

We are not questioning the wisdom of the strict principles applied in the law of real property. *It is essential that the law governing the ownership of land be absolutely certain, regardless of logic.* When a person buys a home, the law must be able to assure him that his title will be upheld by the courts, if

Or as Judge Morris might admonish, folly inheres in change for the mere sake of change.¹⁷

But in assessing the Doctrine's ongoing role, retentive adherence to the past is just as imprudent as blind abolition. Any jurisdiction's decision over the Doctrine of Worthier Title, including the inertial one to "do nothing," should entail careful cost/benefit consideration in light of the design and application of the rule, both as currently conceived, and today. Dragons must be seen for what they are before the choice to tame or slay them can appropriately be made.¹⁸ With this much, Judge Morris and I are in complete accord. But here is where we part company. For while I have learned a great deal from his command of the Doctrine, and agree that technically, its absolute death knell¹⁹ might be premature as little more than

challenged. The surest way yet found to reach that goal is to use language that through centuries has attained a rigid meaning. Early vesting also has a practical advantage, in the avoidance of contingent remainders that would make it impossible for any person or combination of persons to convey good title until the contingency occurred.

Sutton v. Milburn, 711 S.W.2d 808, 812 (Ark. 1986) (emphasis added). Of course, contrary statements abound, as where Justice Holmes famously characterized as "revolting" the retention of rule for "no better reason . . . than that so it was laid down in the time of Henry IV. . . . [Particularly if] the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Justice Holmes's quote is routinely invoked by courts deriding old future interests doctrines in favor of reform.

See Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013), for searing analysis alleging misguided trust in the predictability offered by clear property rules.

17. Although his essay suggests outcome neutrality by merely urging lawmakers to assess the Doctrine to suit jurisdictional needs, Judge Morris reveals his hand in many ways, as where he characterizes the Restatement's move as "regrettable and unjustifiable." Morris, 2016 *Inter Vivos Branch Essay*, *supra* note 11, at 771.

18. It is impossible to over-appreciate Justice Holmes's eloquently pressed perspective on the matter of legal change. As he exhorted in the last years of the 19th century:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step.

The next is either to kill him, or to tame him and make him a useful animal.

Holmes, *supra* note 16, at 469.

19. Is there ever really any other kind?

“a consummation devoutly to be wished,”²⁰ it is a wish that seems to make perfect sense. As the following discussion of the Doctrine in practice and purpose reveals, there is little to be gained in urging its continued application to the modern conveyance.

II. Applying the Doctrine

*A man makes a Feoffment before the Statute of execution of Uses, to the use of himself for the term of his life, the remainder to W. in Taile, the Remainder to the right Heires of the Feoffor, the Feoffor dyes, and W dyes without issue, the right Heir of the Feoffor within Age, he shall be in Ward for the Fee descended; for the use of the Fee-simple, was never out of the Feoffor. And the same Law where a man gives in Taile the Remainder to the right Heires of the Donor, the Fee is not out of him.*²¹

*“[A] man cannot raise a fee simple to his own right heirs by the name of heirs as a purchase neither by conveyance of land, nor by use, nor by devise.”*²²

The Doctrine of Worthier Title can seem impenetrable, even in abbreviated form. Stripped to its core, it is simply the rule against remainders in a grantor’s heirs²³ (just as the Rule in Shelley’s Case prevents

20. MOYNIHAN, *supra* note 8, at 154. Alternatively, see instead William Shakespeare’s *Hamlet*, who in soliloquy bemoans the pain of existence and contemplates a different path:

To be, or not to be, that is the question,
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles,
And by opposing, end them. To die, to sleep—
No more, and by a sleep, to say we end
The heart-ache, and the thousand natural shocks
That flesh is heir to; 'tis a consummation
Devoutly to be wished to die to sleep!
To sleep, perchance to dream, ay there's the rub,
For in that sleep of death, what dreams may come
When we have shuffled off this mortal coil,
Must give us pause

WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 1.

21. 3 BORRON, *supra* note 6, § 1601 n.1 (quoting MARCH’S TRANSLATION OF BROOKE 105).

22. *Id.* § 1601 (quoting *Counden v. Clerke* (1613) 80 Eng. Rep. 180, 181; Hob. 29, 30).

23. While the term “heirs” (technically, intestate successors to land) is commonly used when describing the Doctrine, similar phrases, such as “next of kin,” “takers in intestacy,” or

them in those of a grantee).²⁴ By its operation, the remainder in the grantor's heirs fails. Indeed, not only do those heirs *end up with* nothing (except perhaps the slim wish of an expectancy), they never actually acquire anything *to begin with* at all. Instead, the grantor retains a reversion,²⁵ just as though the attempt to convey the remainder had never been made.²⁶

As one might expect, any doctrine that pretends as though certain conduct did not happen or removes words from a title-transferring page is potent, with the ability to alter, profoundly, intended transactional outcomes.²⁷

A. Assessing Title Without Applying the Doctrine

Assume that *O* validly executes and delivers a deed of Blackacre stating “to *A* for life, and then to my heirs.” At face value, the immediate state of title would be this:

A: Life Estate

O's heirs: Contingent Remainder in Fee Simple Absolute

O: Reversion in Fee Simple Absolute

A has the present possessory interest known as the life estate, which while uncommon in market transactions, is familiar to gifts in trust. *O* and

“takers under the statute of descent and distribution” equally trigger it in jurisdictions where the Doctrine applies. See STOEBUCK & WHITMAN, *supra* note 7, § 3.15; see also 3 BORRON, *supra* note 6, § 1606.

24. See KURTZ, *supra* note 6, at 197. With apologies for hiding complication in a footnote, these parallels are not symmetrical. For example, unlike the Rule in Shelley's Case, the Doctrine of Worthier Title is sometimes said to apply to executory interests as well as remainders in the grantor's heirs, or to personal property as well as real property, or irrespective of whether the relevant interests created were both of either a legal or equitable nature. See, e.g., STOEBUCK & WHITMAN, *supra* note 7, § 3.15.

25. Although this is the best way I can describe the effect of the Doctrine, it might be helpful instead to conceptualize it as taking an existing remainder away from the grantor's heirs and then, by operation of law, “returning” it to the grantor. This would mean that the interest would no longer be termed “contingent” or even a “remainder,” but instead would become “vested” by virtue of being owned by a named being and become a “reversion” by virtue of being owned by the initial grantor. Although there may be some technical difficulties with so viewing the process, the result would be the same: an interest now in and controlled by the grantor, non-divestible by later circumstances outside of the grantor's control.

26. See *Braswell v. Braswell*, 81 S.E.2d 560, 564 (Va. 1954).

27. See 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY §§ 20.02[5], 31.08 (Michael Allan Wolf ed., 2010).

O's heirs both presently own non-possessory future interests. In some sense, those two future interests are similar, and each affords their owner a current complement of rights from which present possession is excised. Nevertheless, they will not forever coexist. The vesting of one will negate the existence of the other, and the vesting of the other means that the first never technically arose.

The initial interest holding a chance at becoming possessory at *A*'s death is the contingent remainder in *O*'s heirs. It is a remainder because its possessory component follows the natural expiration of the prior estate and inheres in one other than the original grantor,²⁸ and, while there may be heirs apparent in *O*'s mind motivating his attempt to entitle them, it is contingent because as long as *O* remains alive, we know not who those heirs will be.²⁹ Not even educated guesses count.³⁰ *O*'s death is certain but that he will leave even a single heir is not.³¹ This potential for unowned property is legal poison, but *O* retains the cure.

28. See, e.g., MOYNIHAN, *supra* note 8, at 110-12.

29. "No living person has heirs. *Nemo est haeres viventis*, the old saying goes." Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1668 (1985).

30. A technical but outdated difference exists between heirs apparent versus presumptive heirs, with the former designating those would-be heirs whose anticipated heirship status cannot be dislodged by a subsequent event (such as birth or marriage), and the latter designating would-be heirs whose could. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. d (AM. LAW INST. 1999).

Either way, it is impossible to discern early whether any of them will end up being "heirs actual" in that (a) any could predecease (thus be barred from taking from) the decedent and (b) the applicable intestacy statute could change.

31. Unless some other future interest intervenes, intestate death without heirs results in escheat, with the state taking ownership—not as heir, but as "original proprietor" for failure of heirs. See, e.g., *Adams Cty. v. State (In re O'Connor's Estate)*, 252 N.W. 826, 827 (Neb. 1934).

The likelihood of escheat lessens with increase in the wealth of the decedent (those with significant assets usually plan through a will) and the expansiveness of the particular intestacy scheme. See generally Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963). More specifically, some versions allow any relative, no matter how distant, to inherit, whereas others cut off inheritance once a certain connectedness to the decedent has passed. Compare 84 OKLA. STAT. § 213(B)(2)(e) (2011) (shifting to a "next of kin" approach after an estate exhausts closer relational lines), with UNIF. PROBATE CODE §§ 2-103, -105 (amended 2010) (terminating inheritance rights where no descendant of a grandparent survives). In other words, unlike the Uniform Probate Code, Oklahoma permits "distant 'laughing heirs' who receive surprise inheritances from, for example, fifth cousins they never even knew existed." Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1554 (1999). See generally John V. Orth, "The Laughing Heir": What's So Funny?, 48 REAL PROP. TR. & EST. L.J. 321 (2013).

In the subject conveyance, the possibility for unowned property is avoided through the reversion, which the law secured to *O* given that his conveyance failed to account for all possible outcomes, “death without heirs” included. The reversion operates as a fail-safe. It will vest into present possession should *O* die without heirs to take the fee, but evaporate should any be left.³²

Note how everyone’s rights are expansive in some ways but limited in others. The life estate affords Owner *A* the present ability to exercise such rights as possession, exclusion, transfer, and enjoyment, circumscribed by practical and legal limits on those rights in time,³³ scope,³⁴ and marketability.³⁵ The contingent remainder in *O*’s heirs gives no one any present possessory rights; frankly, depending on the jurisdiction and its view of contingencies, it offers few practical benefits at all.³⁶ Finally, *O*’s reversion is tenuous. Although it is alienable, descendible, and devisable, it

32. A similar valve was in place were *A* to predecease *O*. One might assume that event to generate an “abeyance of title,” as no one would yet qualify as *O*’s heir, requiring the law (or more appropriately to the time, the overlords) to wait for *O* to die such that heirship (or its failure) could be assessed. See Morris, *Inter Vivos Branch*, *supra* note 6, at 139-40, 140 n.30. Unable to countenance such a result (and the lost revenue that even temporarily unowned property would occasion), the Destructibility Doctrine was born and determined that the contingent remainder in *O*’s heirs would be destroyed for failing to have vested “in time” (i.e., by the expiration of the prior estate). See MOYNIHAN, *supra* note 8, at 128-29. *O*’s reversion would coordinately vest in interest and in possession, and *O* would again hold the full fee. See, e.g., *id.* at 128-35; see also *infra* note 40 and accompanying text. Moreover, if *O* had already died leaving no will and no heirs, escheat would result. See *supra* note 31 and accompanying text.

33. The life estate will end when she does.

34. Consider, for example, the doctrine of waste, which curbs a life tenant’s opportunistic impulses by charging to her the damage occasioned by value-reducing action or inaction. See 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 22.07[4] (Michael Allan Wolf ed., 2010).

35. Although alienable, life estates can be hard to move on the open market and are usually found in the context of intra-family, gratuitous transfers. See generally Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

36. The value of the contingent remainder is speculative because the right itself is speculative. For example, a contingent remainder might not support an action to recover damages for waste. See SIMES, *supra* note 6, at 90-91. A contingent remainder might be too value-elusive to permit the payment of just compensation, or support anything more than nominal damages for its taking. See *id.* at 116-18. A contingent remainder might be deemed voluntarily or involuntarily inalienable, perhaps in part on the largely discredited theory that it is only an inchoate property interest. *Id.* at 70-73. And even were there no legal limits on its alienability, in reality the owner of a contingent remainder will be hard pressed to locate any but the most risk-taking of risk-takers to buy it absent a deep discount on its price.

is also non-possessory. Moreover, it is susceptible to total divestment should *O*'s heirs ever materialize. For that reason, this reversion is speculative, and is more akin to the contingent remainder than its name would suggest.

If the Doctrine of Worthier Title does not apply, the essential outcome set of a completed deed "to *A* for life, and then to my heirs" is closed. Otherwise stated, the card is irretrievably played³⁷: Aside from attempting to alter his ultimate heirs,³⁸ and absent a constructional frolic through unique facts, *O* cannot change his mind, and nor, for that matter, may anyone else.³⁹ If *O* dies leaving heirs, they will end up with Blackacre whether *O* attempted to transfer his reversion post-deed or not. As seen from the perspective of those erstwhile heirs, then, their remainder, although contingent, is also indestructible. Viewed with a long historical lens, that is quite notable.⁴⁰ True, *O* could die leaving no heirs, in which case his reversion will assume ownership reins.⁴¹ But absent murder or some other nefarious act, that fact, or who lives or dies before whom, is generally beyond *O*'s control.

37. Unlike wills, standard deeds are irrevocable upon transfer. *See, e.g.*, STOEBCUK & WHITMAN, *supra* note 7, § 11.3. Compare this convention with the relatively recent transfer-on-death or "beneficiary" deed, which conveys no rights until death and operates as a will substitute. Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 532 (2006).

38. As happens when a single person marries or one without children bears or adopts them.

39. For example, the doctrine of merger, which would have otherwise permitted *O* and *A* to jointly rebundle the life estate and the reversion into a fully marketable fee simple absolute, would have been off the table once the destructibility of contingent remainders was no longer a viable option. *See infra* note 70 and accompanying text (discussing merger).

40. "In the nineteenth century American courts generally accepted the English doctrine of destructibility as a part of the common law." MOYNIHAN, *supra* note 8, at 134. However, a "growing dissatisfaction" was already afoot, and in its country of origin, destructibility was ultimately abolished by the 1900s. *Id.* By 1962, roughly half of the jurisdictions in the United States had abolished the rule in whole or part by statute, and only four jurisdictions affirmatively recognized its continued existence. *Id.* Moreover, the Restatement (First) of Property took the position that the contingent remainder was indestructible, RESTATEMENT OF PROPERTY § 240 (AM. LAW INST. 1936), a position that the Restatement (Third) of Property continues to endorse, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.5 (AM. LAW INST. 2011).

41. If *O* had a will, his reversion would then pass through testate succession to its beneficiaries; if *O* died intestate and without heirs, to the state through escheat.

B. Changing Title through Worthier Title

In the conveyance “to A for life, and then to my heirs,” the outcome changes with the Doctrine of Worthier Title. Applying the Doctrine, it is as though the words of grant to O’s heirs had never been written and the deed had been limited “to A for life.” O’s heirs hold nothing; O’s reversion is indefeasible, and one in the way of which nothing but A’s (necessarily terminable⁴²) interest stands. O can sell his reversion or give it away by gift, in a deed, through a will.⁴³ O and A could consolidate their interests into fee simple absolute, leaving no room for an interest in anyone else. Throughout, there would be nothing that O’s heirs apparent could do. For notwithstanding the clear deed language granting them one, on the impassive watch of the Doctrine, O’s heirs take no interest at all.

In completely rearranging ownership of the future interests in issue, the Doctrine affects three key and interrelated matters: transferability, revocability, and creditors’ rights. As Judge Morris notes,⁴⁴ it turns a divestible reversion in a grantor into an absolute one, completely alienable, descendible, devisable,⁴⁵ and revocable any way that the grantor would have it.⁴⁶ In so doing, the Doctrine simultaneously strengthens the rights of

42. Everybody dies. No matter how far the boundaries currently stretch, and at either the “start” of an individual’s existence or its close, the life estate is currently incapable of potentially infinite duration, and at some point, O’s reversion will become possessory.

43. Before 1540, everyone essentially died intestate because wills were effectively barred. 3 POWELL, *supra* note 34, § 19.04. In part, this prohibition created the conditions for the proliferation of the so-called “use,” simplistically described as a trust-like workaround that approximated the benefits of free testation. *Id.* As such, and coupled with the reality that owners were loathe to convey out of the bloodline outright and lose position in the feudal hierarchy, those heirs probably ended up with the interest anyway, but simply through different means. Otherwise stated, they would have taken through descent rather than by purchase (as where the Doctrine-violating remainder was created in a deed) or devise (as where the Doctrine-violating remainder was created in a will). KURTZ, *supra* note 6, at 209-10. Of course, this all would (or at least, could) change once testation was permissible and the “Os” of the world were free to devise their interest to whomever they might choose.

See, for example, 1 BORRON, *supra* note 6, §§ 26-35, for a more detailed discussion of the Statute of Uses and the Statute of Wills, along with their intended (and unintended) consequences.

44. See Morris, 2016 *Inter Vivos Branch Essay*, *supra* note 11.

45. The sale of a vested interest, particularly an indefeasible one, is far more likely to be both legally permitted and actually accomplished. See STOEBUCK & WHITMAN, *supra* note 7, § 3.7.

46. Consider a settlor who creates a trust reserving income to himself, with remainder to his heirs. Settlor can revoke a revocable trust at any time. If the trust is irrevocable, doing so demands the consent of all beneficiaries.

the grantor's creditors and nullifies those held by creditors of his would-be heirs.

Extending the primary hypothetical illustrates how profound applying the Doctrine can be. Continue to assume a conveyance of Blackacre from "O to A for life, then to my heirs." After delivering that deed, O executes a valid will leaving his "entire estate" to the Red Cross, runs a red light immediately killing all passengers of the other vehicle, and then dies of internal injuries the day after A survived by (1) three nieces who qualify as heirs under the applicable intestacy scheme and (2) a wrongful death action for his negligence in running the light.

Without the Doctrine, O's nieces own Blackacre free and clear of all claims, and owing nothing to the Red Cross, or the tort plaintiffs. O's reversion would have expired along with him, and his interest in Blackacre would not have been captured in his estate. But had the Doctrine applied, *ipso facto* O's nieces would hold nothing and the Red Cross would own it all, subject to O's creditors' claims (including tax debts and judgment liens).

Unless one stands behind the Rawlsian veil, the zero-sum effect of doctrinal application ordinarily means that whether a particular party "likes" the Doctrine of Worthier Title turns on where that party stands vis-à-vis the others in whom coordinate rights inhere. In other words, the answer to whether it should be retained tends to depend on whom is asked, why, and when.

III. Understanding the Doctrine

Knowing whether and how the Doctrine of Worthier Title applies fails to reveal its original purpose, and could even be said to obscure it. An indulgent rationale would claim that (a) by negating contingent remainders, the Doctrine promotes earlier predictability, therefore stability, therefore alienability—all supposedly good things for free markets and their participants,⁴⁷ and (b) it benignly accomplishes exactly that which the grantor intended all along, but by "mistakenly" referencing his own heirs,

The application of the Doctrine of Worthier title nullifies the contingent remainder in the Settlor's heirs, leaving him the sole beneficiary of the trust and free to "agree with himself" on its revocation whenever desired.

47. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (locating the source of successful capitalism within the "legal structure" of Anglo property law). But see Singer, *supra* note 16, at 1371-72 (asserting that the predictability offered by clear property rules may be more stated than real).

was simply a bit too verbose to achieve.⁴⁸ The Doctrine thereby presumed that in conveying a remainder to his own heirs, *O* was superfluously stating the obvious: “To *A* for life, then back to *me* or *my estate*, both of which are entirely within my control.”

The seductiveness of this explanation is undeniable. Coupling powerful public policy bases (e.g. efficiency) with critical private norms (intent) makes choosing for the creation and retention of the Doctrine seem like a highly desirable cakewalk where (most) everybody wins.⁴⁹ No matter how alluring that explanation, however—and aside from the fact that it might be either untrue or irrelevant—history suggests a far different and more covert initial rationale.

Reconsider the sociocultural context within which medieval property rules arose. The value of land increased its market scarcity; the scarcity of land enhanced its market value. That value found expression in the mutually reinforcing trio of money, status, and power, which itself found expression in many of the incidents of tenure (feudal taxes) enhancing the coffers of the crown.⁵⁰ Some of those obligations were only owed at death through intestate descent to heirs.⁵¹ If death taxes were perceived to be as onerous in feudal England as they sometimes are today, then it is no more

48. The second rationale finds additional support in the recognition that a present transfer to a non-existent entity (such as a living person’s “heirs”) traditionally effected no transfer at all. *See supra* note 25 and accompanying text.

49. Of course, the losers would still be those contingent remaindermen, about whom some might claim “well, they never really had any interest anyway.”

50. *See* KURTZ, *supra* note 6, at 7-19.

51. Incidents of tenure varied widely depending on the service owed. For example, tenants might be asked to pray for, cook for, fight for, or otherwise provide for their lords based upon whether their service was ecclesiastical or lay, serjeanty, or knight service. *Id.* at 9-12.

Knight service, while honorable, held many attributes that correspond to a death tax. For example, the heirs of those tenants had to petition the lord for permission to take over the fee as well as pay a “relief” for the privilege of doing so. *See* MOYNIHAN, *supra* note 8, at 19. The petitioner’s success moved from a matter of whim to custom to right, but with the death duty owed for granting it intact throughout. The relief was eventually extended to different types of tenure; according to Moynihan, for example, with “socage tenure the amount of the relief became fixed at one year’s rent.” *Id.* Moynihan continues: “Only after an official inquest to determine heirship, the doing of homage, and the payment of the relief was the heir admitted to seisin or possession.” *Id.*

Even if not entirely historically accurate, an engaging sketch of many of these incidents can be found in Ken Follett’s fictionalized account of romantic, economic, cultural, and political intrigue involving the Kingsbridge Priory from the mid-12th century forward. *See* KEN FOLLETT, *THE PILLARS OF THE EARTH* (1989); KEN FOLLETT, *WORLD WITHOUT END* (2007).

surprising that grantors attempted to evade them by transferring through deeds or wills instead than it is that lawmakers quickly regrouped to force transfers back through descent.⁵² This returns the student of the Doctrine of Worthier title to the titular question posed: worthier for whom? Certainly not for the grantors whose efforts were thwarted, nor for the grantees whose interests were nullified or saddled with tax. As cynical as it sounds, perhaps the Doctrine was worthy, only, for the lords and the Crown,⁵³ with the Doctrine so named to mask its ill-effects on the masses.

A. The Doctrine Thwarts Intent

So reviewed, the attractive rationale of furthering intent probably had very little to do with the Doctrine of Worthier Title at all, at least as it was initially conceived. Upon careful reflection, how could it have? First, it was born in response to an implied (if not admitted) attempt by grantors *to do exactly what their deeds said they were doing*: effect a tax dodge. Second, it came of age as a defiant rule of law rather than one of construction, yielding to no opposing intent notwithstanding how clearly or ardently expressed.

52. This is the rationale expressed by numerous writers on point, some of whom point to far earlier accounts of the Doctrine in support.

It is highly probable that . . . [the Doctrine was driven by] [f]eudal policy [which] dictated that the incidents of tenure accruing to the lord on the death of the tenant should not be evaded. At the time, feudal policy was public policy and the feudal estate tax must be paid. . . . [A] devise by a tenant to his own heir would be too obvious an evasion of the lord's seignorial rights to be tolerated.

MOYNIHAN, *supra* note 8, at 151-52; *see, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 cmt. a (AM. LAW INST. 2011) ("There was a preference for title by descent rather than by purchase [because] [t]he overlord was entitled to the valuable incidents of relief (an inheritance tax) when an heir inherited land, and, with respect to many types of land ownership, the overlord was entitled also to the valuable incidents of wardship and marriage when an inheriting heir was a minor or a woman."); SIMES, *supra* note 6, at 56-57 (noting that the precise reasons for the Doctrine are "none too clear," and continuing by stating that "in all probability the best explanation is the same as that already put forward for the Rule in Shelley's case[] [, i.e. that] [i]n the absence of such a rule, the overlord would be deprived of the 'fruits of his seignior.'"(footnote omitted)).

53. In fairness, it might be said that property acquisition through intestate rather than testate succession was in fact superior under the Doctrine's testamentary branch, in that those who took by descent rather than devise acquired greater remedies against disseisin. *See, e.g.*, MOYNIHAN, *supra* note 8, at 150 n.2 (citing "the leading case" of *Ellis v. Page*, 61 Mass. (7 Cush.) 161 (1851)). Extending that rationale to inter vivos conveyances, however, might be a bit like the reverse of trying to swallow half a raw egg.

Although arising in connection with the Rule in Shelley's Case rather than the Doctrine per se, such implacability is vividly demonstrated in *Bishop v. Williams*.⁵⁴ The grantor conveyed land to two brothers, the deed stating "to have and to hold to them during their natural lives with remainder after their death to their heirs, the term heirs herein used [as] a term of purchase and not of limitation."⁵⁵ Were the Rule one of construction and not law, its application would have given way to the deed's express caution that the grantees' heirs should take in their own right as lifetime transferees, rather than as heirs through the estates of their ancestors.⁵⁶ Nevertheless, Justice George Rose Smith avowed it was not:

This argument is fallacious in that it assumes that the Rule in Shelley's Case is a rule of construction, designed to assist the court in determining the grantor's intention. But the contrary is true; the Rule is one of law, to be applied without regard to the conveyor's intention. Indeed, it is safe to say that in almost every instance the Rule has the effect of creating a fee when the grantor or testator meant to bring into being some other estate. . . . Of course the grantors did not mean for [a different grantee] to take the fee title; but, following a rule that has been in force for some six centuries, we held that to be the effect of their conveyance. Our cases have announced the doctrine so frequently that it has become a rule of property which we are not free to disregard.⁵⁷

The Doctrine of Worthier Title developed similarly, which would mean it too would apply even were the deed to explicitly state that it should not.

Few useful doctrines can simultaneously further and frustrate intent.⁵⁸ Arguably, the only way any rule that prohibits an actor from achieving the sought consequences of the act can be claimed "intent-effectuating" would

54. 255 S.W.2d 171 (Ark. 1953).

55. *Id.* at 171-72.

56. *See id.* at 172.

57. *Id.* Justice Rose Smith later continued: "The testator could hardly have been more emphatic than he was in *Lauer v. Hoffman*, where, after using words that came within the Rule, he added that 'in no event whatever shall the fee simple . . . vest [in my daughter].'⁵⁸ Nevertheless it did." *Id.* (alteration in original) (citations omitted). *See generally* 3 POWELL, *supra* note 34, § 31.07[2] ("[T]he Rule in Shelley's Case is a rule of law that applies despite the conveyor's most explicit manifestation of his desire that it not apply.").

58. In fact, at least where both are assessed vis-à-vis the same person, I can think of none.

be to assume that the grantor either did not really know what he was doing or did not really mean what he said.

That “furthering presumed intent” was not likely part of the medieval mind’s doctrinal rationale does not foreclose the chance that it justifies its twenty-first century retention. This rationale would be compelling were there strong evidence that at some point between roughly the fifteenth century and today, grantors and their lawyers had become keenly aware of the Doctrine’s tricky contours and reliant on its *sua sponte* application, or willing to litigate to so transmute the interests their deeds had created or clarify the words they wrote. Such a conviction would require a few mental turns equally unlikely and odd,⁵⁹ with no evidence to suggest that this is the case.⁶⁰

Notwithstanding the confusion that sometimes surrounds the phrase “my heirs,”⁶¹ it is implausible to think that it is used to mean “my *self*,”⁶² and counterintuitive (if not counterfactual) to suppose that grantors who want to retain better rights think the best way to get there is to name their own heirs as grantees. Instead, conveyors who seek flexibility are freely able to do so simply by omitting any reference to remainders at all, stopping after “to A for life,” or using the expedient of a beneficiary deed.

59. The suggestion reminds me of the movie *Body Heat*, which took the fantastical license of presenting an opportunistic young spouse who understood the application of the Rule Against Perpetuities and duped her unwitting lawyer/lover into drafting a will in its violation so as to inure to her personal gain. *BODY HEAT* (Warner Bros. Entertainment, Inc. 1981).

60. If it were, the law books would be filled with cases where grantors (rather than self-interested others chancing upon its benefits to themselves) had urged the application of the Doctrine, which is unlikely given that but ten or so cases even invoke the Doctrine since 1990, and most, simply, as asides.

61. Beneficiaries, devisees, or legatees take under wills, not heirs. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 43, 387 (9th ed. 2013). Relatedly, distributes or next of kin take intestate personal property; technically, heirs are only intestate successors to land. *Id.* at 44. Neither children nor named takers equal “heirs,” even though they may end up fitting that category, nor (given that statutes can change) are “heirs” those who would stand to take were the decedent to die at that very moment. *Id.* at 70.

62. Much less “me, myself, and I.” The notion might be less ludicrous were the deed to be qualified somehow, as with “to A for life and then to revert back to me or my heirs.” The use of the word “revert” intimates a reversion; the disjunctive “or” between “me” and “my” suggests that the grantor believes that the heirs should take only in the event that the interest was not otherwise transferred through deed or through will.

B. Efficiency Isn't Enough

Efficiency is compelling. Few would dispute that property interests unburdened by such unknowables as whether contingencies will vest or the names of those who will take them can move earlier, for more money, and more easily through the ownership world.⁶³ With the Doctrine of Worthier Title in place, grantors and life tenants can cross-transfer to create present fees in one or the other, or join to convey all outstanding interests to some third party absolute.⁶⁴ Perhaps that is what grantors of Doctrine-triggering deeds have intended all along. If so, they have certainly had a peculiar way of showing it.⁶⁵ No matter how potent the desire for immediate gratification and unimpeded transferability may be, the argument rings hollow as little more than convenient post-hoc rationale.

As already described, nothing suggests that efficiency was the historical fuse for the Doctrine, and it seems to have been voiced—perhaps by happy accident—only after its operation was entrenched. Moreover, as medieval grantors were probably little interested in losing their place in the feudal chain through outright, extra-family alienation,⁶⁶ neither their concerns nor those of their overlords would seem to have cared much about removing transaction impediments. Perhaps most importantly, in the centuries since assorted earlier vesting (thus transfer-supporting) future interest rules have arisen, Anglo-American jurisprudence has demonstrated but slight concern for their furtherance, especially when to do so would arguably contravene grantor's intent. In other words, efficiency is not enough.

This observation is starkly illustrated through the near wholesale abolition of three cohort rules, all of which have much to say about the inhibiting force of unvested concerns. Nevertheless, the first two are virtually extinct, and the third continues—even in 2016—to draw legislative fire.

63. One need look no further than basic marketable title principles to see how this is so.

64. For example, under the conveyance “to A for life, then to O's heirs,” without the Doctrine, an interested purchaser of the entire fee would need to wait until O died, identify the heirs (who, if any existed, would then hold indefeasibly vested remainders), and purchase their outstanding interests along with A's. By contrast, if the Doctrine applied, that third party could simply buy from both A and O, and merge into the full fee. *See infra* note 70 and accompanying text.

65. *See supra* note 62 and accompanying text.

66. The urge to keep property within blood lines was driving enough to generate the creation of the interest known as the fee tail, which lives on only in ignominy in a very small number of jurisdictions. *See* 1 BORRON, *supra* note 6, § 13; KURTZ, *supra* note 6, at 56.

1. *The Rule in Shelley's Case*

*If a freehold estate is conveyed by deed or bequeathed by will to a person and in the same conveyance or will a remainder is limited to the heirs or to the heirs of the body of that person, that person takes both the freehold estate and the remainder.*⁶⁷

The Rule in Shelley's Case tracks to the Doctrine of Worthier Title, but by converting contingent remainders in the heirs of a *grantee* into a vested remainder in that grantee,⁶⁸ rather than affecting any rights in the heirs of the *grantor*. Note how the Rule promotes alienability: If a contingent remainder in A's heirs is reprocessed as a vested remainder in A,⁶⁹ merger may follow to give A a present and freely alienable, descendible, and devisable fee simple absolute.⁷⁰ When that happens, the market is served.

Although initially "almost universally accepted by the courts [of the United States as an integral part of the common law,]"⁷¹ the Rule has been abolished by legislation in all but a handful of jurisdictions.⁷² Even there, its viability is questionable. What is more, abolition of the Rule has been resounding notwithstanding a clear view of the transferability enhancement that it offers: "[w]hen feudal conditions could no longer justify its existence, its continuance was assured by the inertia of precedent and the

67. KURTZ, *supra* note 6, at 197.

68. Rather than affecting the heirs of the grantor. *See supra* note 24 and accompanying text. *See generally* MOYNIHAN, *supra* note 8, at 138-49.

69. The interest becomes vested because unlike her heirs, A herself is already born, currently ascertainable, and subject to no condition precedent.

70. Merger is essentially estates math, under which the sum of a life estate plus a vested interest, owned by the same person and in the same land, can possibly equal a fee simple absolute. *See, e.g.*, MOYNIHAN, *supra* note 8, at 131, 142-43.

71. *Id.* at 141.

72. *See* 3 BORRON, *supra* note 6, § 1563; C.C. Marvel, Annotation, *Modern Status of the Rule in Shelley's Case*, 99 A.L.R.2d 1161, 1165-66 (1965) ("In the great majority of American jurisdictions, the [R]ule in Shelley's Case has been abolished, wholly or in part, by express statutory provisions . . ."). The Rule was abolished in England in 1925. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 131 (Eng.).

Although pronouncements vary, it appears that at most, the Rule lives on with varying degrees of contextual applicability in Colorado, Delaware, Indiana, Louisiana, New Hampshire, and Oregon. KURTZ, *supra* note 6, at 208 n.149. Arkansas, which had a healthy amount of case law on the topic (including heavy investment in its casting as a positive rule law not giving way to contrary intent), abolished the Rule in 2003. *See supra* notes 14, 57 and accompanying text.

fact that it tended to increase the alienability of land.”⁷³ That reality, apparently, has not been enough to save it.

2. *The Doctrine of Destructibility of Contingent Remainders*

Under the Destructibility Doctrine, a contingent remainder that failed to vest “in time,” i.e., by the expiration of the estate that preceded it, was immediately destroyed rather than permitted a chance to vest “soon enough.”⁷⁴ Its ostensible design was to avoid an abeyance of seisin and thereby maintain an unbroken line of ownership (thus taxation), and its usual result was a fully alienable, descendible, and devisable fee in the original grantor.⁷⁵

The logic made sense. Consider a conveyance “to *A* for life, then to *B*’s heirs.” *A* would hold a life estate, *B*’s heirs a contingent remainder, and (because the prior remainder was contingent) *O* would retain a reversion. If *B* survived *A*, *B*’s heirs would remain unknown and thus contingent at the expiration of the prior estate (here, *A*’s death). Destroying that remainder for failing to vest in time would accelerate *O*’s reversion and simultaneously vest it into possession as a fee simple absolute, thereby permitting its immediate taxation and returning, to *O*, absolute freedom of choice.⁷⁶ The alternatives would have been to wait for *B* to die, property temporarily unowned, or maintain a place for *B*’s heirs by vesting *O* with a defeasible fee to be lost at *B*’s later death. The first option—destructibility—furthered full and immediate fee alienability; the second two deferred it.

By the nineteenth century, there was a “growing dissatisfaction” with the Destructibility Doctrine in the United States.⁷⁷ In critiquing it (and associated pressures to construe remainders as vested over contingent⁷⁸),

73. MOYNIHAN, *supra* note 8, at 140.

74. *Id.* at 128-34.

75. *See id.* at 128-29.

76. Note that *O*’s choices included one consistent with the earlier stated preference: to transfer the interest to *B*’s heirs upon *B*’s later death. Alternatively, of course, *O* could simply choose instead to sell Blackacre to the highest bidder and move to the Pitcairn Islands (where the Rule apparently lives on).

77. *See* MOYNIHAN, *supra* note 8, at 134.

78. The constructional preference is nicely explained in a relatively recent decision: The favoritism for the vesting of remainders came about in order to nullify the many burdensome technicalities of the feudal system with respect to contingent remainders. Many of the reasons which generated the favoritism have long been nonexistent. It is no longer an important rule of construction, and should not be. As said by Justice Evans in *Fulton v. Fulton*, 179 Iowa 948, 966, 162

Illinois Supreme Court Justice Seymour Simon disparaged the Rule with what should, by now, be a familiar refrain: “[T]he destruction of contingent remainders was an archaic device which frequently frustrated grantors’ intentions by prematurely defeating an interest subject to a condition.”⁷⁹ Similar views have been expressed or endorsed countless times before and since, such that there seem to be no jurisdictions that have—at least recently—embraced destructibility.⁸⁰ That this is so, regardless of the extent to which destructibility promotes early alienability, is telling.⁸¹

3. The Rule Against Perpetuities

*No interest is good unless it must vest, if at all, no later than twenty-one years after some life or lives in being at the creation of the interest.*⁸²

The Rule Against Perpetuities is little more than the exposition of a pro-vesting approach. It often invalidates such speculative future interests as the executory interest and contingent remainder, and thereby frees land from the sorts of title imperfections that thwart free and valuable transfer.⁸³ Notwithstanding salutary effect, the Rule faces extinction given the number

N.W. 253, 258, L.R.A.1918 E1080: “The dominant rule of construction with us is that the intent of the testator, as it is fairly gathered from the will, must prevail.”

In re Estate of Ruhland, 452 N.W.2d 417, 419 (Iowa 1990) (quoting *Henkel v. Auchstetter*, 39 N.W.2d 650, 654 (Iowa 1949)).

79. *Harris Tr. & Sav. Bank v. Beach*, 513 N.E.2d 833, 838 (Ill. 1987).

80. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.5 (AM. LAW INST. 2011) (“The Rule of Destructibility of Contingent Remainders is not recognized as part of American law. A legal contingent future interest in land is not destroyed by failing to vest on or before the time when the preceding life estate terminates.”).

81. Jurisdictions that reject destructibility do not solve the issue merely by deeming the remainder to have vested in disregard of the grantor’s intent. Instead, the usual fix (assuming that construction of the instrument will permit it) is to conceptually convert the future interest from a contingent remainder into a springing executory interest, and then give it some amount of time to vest. See, e.g., Albert M. Kales, *The Later History of the Rule of Destructibility of Contingent Remainders*, 28 YALE L. J. 656 (1919); KURTZ, *supra* note 6, at 192-93.

82. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (Roland Gray ed., 4th ed. 1942).

83. See KURTZ, *supra* note 6, at 267-69.

of jurisdictions in which it has been abrogated outright or at least legislated into virtual death.⁸⁴

The fall of each of these doctrines—none too terribly esoteric, and all pushing alienability but against the throat of intent—signals a similar fate for the Doctrine of Worthier Title. This is so not simply because all four rules are of a piece on superficial-to-medium-depth rationale. Instead, it is because they are so deeply interconnected that jettisoning some of the rules but leaving this Doctrine intact would be a bit like throwing out the baby but leaving the bathwater behind.

Nor should there be salvation in the tepid reconfiguration of the Doctrine from a rule of law to one of construction, notwithstanding the earlier view that so doing might temper some of the concerns that its harsh application had surfaced.⁸⁵ If the goal of that shift was to better promote either intent or alienability, the fix fell far short of both marks. Whatever its demerits, an inalterable rule either way would avoid costly, fact-specific litigation over intent and promote heightened expressive clarity. Although presumptions can be useful whenever intent is key to an outcome, it is unclear whether this rule of construction even erects one. Particularly if the legitimacy of this “construction limbo” derives from a dated time, place, or case, it seems poised to undermine both intent *and* alienability, an outcome to which no jurisdiction should aspire.

IV. Does the Doctrine of Worthier Title Remain?

Judge Morris chastises the drafters of the Restatement (Third) of Property for basing their rejection of the Doctrine of Worthier Title, in part, on its obsolescence as “no longer a part of American law.”⁸⁶ From a pure numbers perspective, it is unclear whether this assertion is correct. More pressingly, given the recursive nature of Restatements, is the tautological quality to the concern. Is the Doctrine already obsolete, or will its characterization as such by the Restatement soon make it so? In a sense,

84. Asking (and affirmatively answering) whether the Rule “deserve[s] a well-earned, but long-in-coming, retirement,” Professor Scott Andrew Shepard notes that the majority of states have either abolished or modified the rule, or have embraced the approach promulgated by the Uniform Statutory Rule Against Perpetuities promulgating a “wait-and-see” period of ninety years under which rule-vulnerable interests will have a chance to successfully vest. See Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 89, 90-91 (2013).

85. Justice Benjamin Cardozo famously so shepherded the Doctrine in *Doctor v. Hughes*, 122 N.E. 221, 222 (N.Y. 1919).

86. Morris, 2016 *Inter Vivos Branch Essay*, *supra* note 11, at 771.

then, Judge Morris's frustration might be informed by broader dispute over the extent to which Restatements should summarize extant doctrine "as is" versus promote particular reform. Although prompted to comment by a quite different Restatement provision, Justice Scalia has tartly framed matters:

The object of the original Restatements was "to present an orderly statement of the general common law." Restatement of Conflict of Laws, Introduction, p. viii (1934). Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . [The Restatement provision in issue] constitutes a "novel extension" of the law that finds little if any support in case law. . . . [The Restatement] should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.⁸⁷

At least one set of scholars ostensibly agrees: "Perhaps most critically, the *Second* and *Third Restatements of Property* have been given over to campaigns for legal reform, often entailing the repudiation of earlier volumes of the Restatement, which has very likely undermined the utility and the credibility of the ALI's effort."⁸⁸

Judge Morris makes a valid point. The factual and authoritative cast of the Restatement's determination—that the Doctrine of Worthier Title "is not recognized[.]"—tellingly departs from prior draft language, which in "repudiating" it revealed a more aspirational, forward-looking bent.⁸⁹ Either way, he also rightly notes that the claim of its death may be overstated, particularly if, as recently as 2015, it was described by noted Professor

87. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part) (citation omitted).

88. Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 682 (2014). See Lawrence W. Waggoner, *How the ALI's Restatement Third of Property Is Influencing the Law of Trusts and Estates*, 80 BROOK. L. REV. 1019, 1027 (2015), for an opposing perspective from an equally esteemed source.

89. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.3 (AM. LAW INST., Tentative Draft No. 4, 2004).

Shelley Kurtz as “play[ing] a vigorous and important role in modern law,”⁹⁰ and only a few years before, was criticized as causing the disqualification of special needs trusts by the Social Security Administration.⁹¹ Finally, Judge Morris cautions that each jurisdiction must assess the Doctrine within its own context and precedent, deciding whether and to what extent non-recognition *ab initio*, prospective abolition, or perhaps even continuation represents the optimal jurisprudential response.⁹² He is correct, of course, particularly in states like Oklahoma, which while having invoked, adverted to, or applied it several times, has arguably “not had occasion to adopt or reject the ‘worthier title’ doctrine.”⁹³ That the future of such rules is worth considering, and carefully, should be beyond reproach.

But whatever the current count among states with clear answers to the question, numerous commentators have called for the Doctrine’s abolition.⁹⁴ Legislative reaction is virtually unanimous in targeting

90. KURTZ, *supra* note 6, at 214.

91. See Mary F. Radford & Clarissa Bryan, *Irrevocability of Special Needs Trusts: The Tangled Web That is Woven When English Feudal Law Is Imported into Modern Determinations of Medicaid Eligibility*, 8 NAELA J. 1 (2012).

92. See, e.g., Gerard D’Emilio, *Frontier Feudalism* (Nov. 22, 2016) (student comment in progress; notes on file with author) (discussing how Oklahoma’s sociopolitical history might inform its view of property, ownership, and intent-affecting doctrines).

93. *Beamer v. Ashby*, 231 P.2d 668, 669 (Ok. 1951); see also *Horton v. Cronley*, 270 P.2d 306, 313-14 (Okla. 1953); *Dunnett v. First Nat’l Bank & Trust Co. of Tulsa*, 85 P.2d 281 (Okla. 1938) (effectively applying Doctrine by equating beneficiary designation to the “heirs of the grantor” with a reserved reversion in that grantor thus removing the need for beneficiary consent to revocation).

94. Two comprehensive and considered treatments agree that the Doctrine should be retired. See D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 55-60, 71 (2009); T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 529, 543-48 (2003) (urging that “this obsolete doctrine [should] disappear from the law, remaining only the province of the historian.”). See generally THOMAS P. GALLANIS & LAWRENCE W. WAGGONER, *ESTATES, FUTURE INTERESTS, AND POWERS OF APPOINTMENT IN A NUTSHELL* (5th ed. 2014) (arguing that the Destructibility Rule, Rule in Shelley’s Case, and Doctrine of Worthier Title be abolished).

Even Earlier criticisms evaluate the Doctrine in a similar light. See, e.g., Stanley M. Johanson, *Reversions, Remainders, and the Doctrine of Worthier Title*, 45 TEX. L. REV. 1, 3, 42-43 (1966) (calling for the Doctrine to be vanquished as both a rule of law and of construction by characterizing it as an “antiquated doctrine of the common law that should have died of atrophy” and noting that its justifications “disappeared long before American law began to develop”); Note, *The Uniform Property Act*, 52 HARV. L. REV. 993, 1000 (1939) (characterizing the doctrine, in 1939, as “of slight importance today”); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 766 (1972) (demurring on a specific proposal, but noting that if such

abrogation.⁹⁵ The Uniform Probate Code⁹⁶ and the Uniform Property Act⁹⁷ unite in opposition. Even England, the country of its origin, statutorily retired the rule almost two centuries ago.⁹⁸ These trend lines have long been in place. Writing in 1933, an anonymous author in the Harvard Law Review observed that unsurprisingly, the Doctrine, an “out-of-date-dogma,”⁹⁹ was frequently overlooked except where wielded by an activist court. He continued:

Little justification for its existence remains. Yet even the courts which concede that for the rule “[] there are not the same reasons under our laws as in England []” affirm that they “[] have no disposition to disregard it[.]” The reason is not far to seek. Although in its orthodox sphere the rule serves merely to add a touch of uncertainty to a narrow sector of real property law, as applied by modern judges it is on occasion a useful weapon in the armory of the judicial legislator.¹⁰⁰

A confusing but benign doctrine is bad enough, but its weaponized version is worse.

V. Conclusion

Something is said to be “worthy” when it has commendable merit or principle; “worthier” when that merit transcends the alternatives. Given modern contexts, the Doctrine of Worthier Title does not deserve its name. If the choice is a binary one between affirming or rejecting the Doctrine, then most states and the Restatement (Third) of Property have made the better bet.

Intent is paramount when construing expressive documents.¹⁰¹ Unless significant public policy concerns exist, donative, testamentary, and

rules as the Doctrine of Worthier Title “were abolished, as they should be,” few critical consequences would flow).

95. See 3 BORRON, *supra* note 6, § 1612.

96. UNIF. PROBATE CODE § 2-710 (amended 2010).

97. UNIF. PROP. ACT § 14 (1938).

98. Inheritance Act 1833, 3 & 4 Will. 4 c. 106, § 3 (Eng.).

99. Note, *The Rule Favoring Title by Descent Over Title by Devise*, 46 HARV. L. REV. 993, 1000 n.61 (1933).

100. *Id.* at 1000 (footnotes omitted).

101. See, for example, the “fall of formalism” that has attended the shift from a strict statutory compliance required of a will toward a substantial or even “harmless error” approaches more modernly deployed in determining whether statutory formalities have been

contractual freedoms deserve the preeminence claimed for them, an end that the Doctrine perversely impedes. Worse, what little countervailing justification its modern retention might reflect can be met in superior ways. For example, trust settlors can expressly make their trusts revocable (a result that might be jurisdictionally presumed anyway), and no longer need the Doctrine to maneuver into that result though the back door.¹⁰² Similarly, that trustees hold legal title to all trust assets ensures that the Doctrine is not needed for any trust property to be conveyed.

If the Doctrine actually frustrates intent, it deserves to be retired, just as if its utility is limited to curious facts, unique conveyors, or outlier grants.¹⁰³ As has been asserted in a context analogous to the present one, “[common law property rules applied to] modern property relationships [should not be] obsolete and lacking in any utilitarian value[, especially where] the rule is antiquated and in direct contradiction with our cardinal rule of construction, which is to ascertain and effectuate the intention of the parties.”¹⁰⁴

It is true that abolition is change. But predictability is only a positive value if reliance is itself both predictable and justifiable. Moreover, just because something is efficient does not make it right, particularly where worthwhile alternatives exist at a lesser philosophical cost. There are places

met. See Katherine R. Guzman, *Where Strict Meets Substantial: Oklahoma Standards for the Execution of a Will*, 66 OKLA. L. REV. 543 (2014).

102. See, e.g., UNIF. TRUST CODE § 602 (trusts presumed revocable).

103. In a similar vein, consider the old common law rule prohibiting the reservation of an easement to one other than the grantor of a deed. Writing for a majority that prospectively abolished the rule, Justice Peters remarked that:

In considering our continued adherence to it, we must realize that our courts no longer feel constricted by feudal forms of conveyancing. Rather, our primary objective in construing a conveyance is to try to give effect to the intent of the grantor. In general, therefore, grants are to be interpreted in the same way as other contracts and not according to rigid feudal standards. The common law rule conflicts with the modern approach to construing deeds because it can frustrate the grantor's intent. Moreover, it produces an inequitable result . . .

Willard v. First Church of Christ, Scientist, 498 P.2d 987, 989 (Cal. 1972) (citations omitted).

Justice Peters later continued by noting that there was no evidence to show that grantees or title insurers had relied upon the old rule. *Id.* at 991.

104. See John E. Lansche, Jr., Note, *Ancient, Antiquated, & Archaic: South Carolina Fails to Embrace the Rule that a Grantor May Reserve an Easement in Favor of a Third Party*, 52 S.C. L. REV. 269, 269-70 (2000) (noting Judge Anderson's dissent in *Springob v. Farrar*, 514 S.E.2d 135 (S.C. Ct. App. 1999) and arguing in favor of ancient common law principles that would effectuate the grantor's intent).

where the status of the Doctrine of Worthier Title is unclear, with the opportunity to drive mischief and expense should a Doctrine-triggering conveyance find its way into court. That unpredictability is best cured by abolishing the Doctrine, a move that would likely generate few downsides considering the dearth of case law invoking the rule. In discerning how to best to move further with modern conveyancing law and practice, it may be that there is nothing quite like a clean slate.